IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2006 Session

STATE OF TENNESSEE v. BRANDON COMPTON

Appeal from the Criminal Court for Knox County
No. 78832 Mary Beth Leibowitz, Judge

No. E2005-01419-CCA-R3-CD - Filed October 13, 2006

The Appellant, Brandon Compton, was convicted by a Knox County jury of two counts of first degree premeditated murder and was subsequently sentenced to two consecutive life sentences. On appeal, Compton raises three issues for our review: (1) whether the evidence is sufficient to support the verdicts, specifically the element of premeditation; (2) whether the trial court erred in granting the State's request for a special jury instruction with regard to the element of premeditation; and (3) whether consecutive sentencing was proper. After review of the record, we conclude that issue (3) is without merit; however, we conclude that reversible error exists with regard to issues (1) and (2). Although we conclude that the evidence is legally insufficient to support convictions for first degree murder, as the evidence failed to establish that the crimes were committed with premeditation, the evidence is sufficient to support convictions for second degree murder. Accordingly, the judgments of conviction and sentences are vacated, and the case is remanded to the trial court for resentencing in accordance with this opinion.

Tenn. R. App. P. 3; Judgments of Conviction for First Degree Murder Vacated; Sentences Modified and Case Remanded for Entry of Convictions for Second Degree Murder and Resentencing

DAVID G. HAYES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Robert R. Kurtz, Knoxville, Tennessee, for the Appellant, Brandon Compton.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leslie Nassios, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On June 13, 2003, the victim, Kellan Shown, contacted Timothy Williams about purchasing a pound of marijuana. Williams contacted the Appellant, who agreed to make the sale. It was agreed that the Appellant would come to a house on Burwell Avenue where Williams was staying to complete the transaction. Also living in the house at the time were a number of individuals, including James and Marla Lindsey and David and Angie Talbot, as well as their families, including Lindsey's sixteen-year-old step-daughter, Whitney. Although not entirely clear from the record, most of these individuals, including the young children, were present on the evening of June 13th into the morning hours of June 14th, along with Whitney's boyfriend, Shane Cantor. Shortly before midnight, the Appellant arrived at the house and was met on the porch by Williams. Williams then accompanied the Appellant inside the house where a number of people were socializing and smoking marijuana in the living room. Prior to entering, the Appellant and Williams noticed a car parked across the street from the house with three men inside, later identified as the two victims, Shown and Clayton Hall, and the driver of the vehicle, Charles Chandler. Williams commented that the individuals in the vehicle were acting funny, and, according to Lindsey, the Appellant patted his side and said, "I ain't got nothin' to worry about." However, the Appellant appeared calm during this encounter. Shortly thereafter, the two victims, whom the Appellant had never met, entered the house, at which time the Appellant proceeded to show Shown and Hall the marijuana. Upon agreeing to the purchase, Shown handed the Appellant $1000. However, upon inspection of the money, the Appellant thought that it looked suspicious and asked for a bowl of water. Whitney got the Appellant some water, and he proceeded to dip the money into the water causing the ink to run. The Appellant still remained calm and told the victims that apparently someone had given them counterfeit money. He then asked for his drugs back. The victim,[1] still in possession of the marijuana, stood up and said, "Fuck it. I'm going home." Both Shown and Hall then proceeded toward the door with the marijuana. The Appellant followed the pair down the hall and into a small foyer. Whitney was also in the hallway and was pushed out of the way. When Williams and Lindsey caught up with the group, they saw the Appellant with his gun drawn firing at the two victims. At least four shots were heard. Accordingly to Lindsey, the Appellant said, "That's what you get for stealing my weed." Afterwards, the Appellant retrieved the drugs and then ran out the back door and told everyone that they had not seen him there. The entire event took place in seconds. Once the Appellant was gone, Lindsey began "freaking out" because the deceased were in plain view of the children. The bodies of the victims were then dragged outside the home, and the police were called.

Police recovered four shell casings in the area where the shooting occurred, as well as a bullet found in the living room which had gone through a wall. Additionally, Lindsey later found a fifth shell casing in a plant and called police to collect it as well. Two bullets were recovered from each of the victims during the autopsy. Moreover, investigators found five counterfeit one hundred dollar bills in Shown's pocket, as well as a small quantity of crack cocaine. No weapons were recovered at the scene. The occupants of the residence identified the Appellant as the shooter, and police proceeded to search for him. Shortly thereafter, the Appellant was arrested at his home without incident.

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[1]The record fails to establish whether it was the victim Shown or the victim Hall who was in possession of the drugs; however, it is clear that one of the victims stood up and prepared to leave with the marijuana.

The autopsies revealed that each victim was shot twice, with each shot being capable of producing death, and each victim died as a result of the wounds received. Shown, age twenty-two, had two gunshot wounds on the left side of his body, one to the head and one to the back. Hall, age eighteen, was shot twice on the right side of his body, one wound to the cheek and one to the back. The medical examiner testified that each wound was a distant gunshot wound, meaning that the weapon was fired from at least three feet away.

The twenty-two year old Appellant also testified at trial and admitted that, while he did maintain employment, his primary source of income was derived from selling drugs. He testified that he had gone to the house on Burwell that evening to sell marijuana to the victims. According to the Appellant, when he followed the victims into the foyer after they attempted to leave with his drugs, his gun was still in his pocket. He stated that he had gotten the nine millimeter pistol approximately one month earlier after his uncle was robbed and shot. The Appellant testified that he shot the victims in self-defense only after the victim Hall turned around in the foyer and fired at him. He testified that after the shootings he panicked, and, upon leaving the house, he picked up Hall's gun and the marijuana and fled.

On January 20, 2004, the Appellant was indicted by a Knox County grand jury for two counts of premeditated first degree murder. Following a jury trial, which began February 7, 2005, the Appellant was convicted as charged and subsequently sentenced to two consecutive life sentences. Following the denial of his motion for new trial, the Appellant filed the instant timely appeal.

Analysis

On appeal, the Appellant has raised three issues for our review: (1) whether the evidence was sufficient to support the verdicts, specifically the element of premeditation; (2) whether the trial court properly instructed the jury with regard to the element of premeditation; and (3) whether the court erred in imposing consecutive sentences.

I. Sufficiency of the Evidence

First, the Appellant contends that the evidence presented at trial was insufficient to support the verdicts because the State failed to establish the element of premeditation. In considering the issue of sufficiency of the evidence, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

"A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Although a conviction may be based entirely upon circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1974), in such cases, the facts must be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991) (citing *State v. Duncan*, 698 S.W.2d 63 (Tenn. 1985)). However, as in the case of direct evidence, the weight to be given circumstantial evidence and "the inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958) (citations omitted).

The Appellant was convicted of first degree murder which is defined in relevant part as "[a] premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1) (2003). Premeditation necessitates "a previously formed design or intent to kill," *State v. West*, 844 S.W.2d 144, 147 (Tenn. 1992) (citations omitted), and "an act done after the exercise of reflection and judgment . . . [, meaning] that the intent to kill must have been formed prior to the act itself." *Id*. at (d). An additional requirement is that the accused be "sufficiently free from excitement and passion as to be capable of premeditation." *Id*.

The element of premeditation is a question of fact to be determined by the jury from all the circumstances surrounding the killing. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Although the jury may not engage in speculation, it may infer premeditation from the manner and circumstances of the killing. *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *State v. Bordis*, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995). Our supreme court has delineated several circumstances which may be indicative of premeditation, including declarations of the intent to kill, procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, infliction of multiple wounds, the making of preparations before the killing for the purpose of concealing the crime, destruction or secretion of evidence, and calmness immediately after the killing. *State v. Jackson*, 173 S.W.3d 401, 409 (Tenn. 2005); *State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000).

On appeal, the Appellant challenges the sufficiency of the convicting evidence only with respect to the element of premeditation. As the Appellant acknowledges, there is no dispute that he shot and killed each of the victims. However, the Appellant argues there was no direct evidence of premeditation and that his "testimony, and the circumstantial evidence, do not support a finding that these murders were committed with premeditation." He asserts that this absence of premeditation

coupled with the "startling event" which occurred in the foyer of the home establish that he is guilty of only second degree murder. The State argues, however, that the evidence establishes the element of premeditation and that "the Appellant formed the intent to kill the victims and then fired bullets into the victims to make them pay for trying to 'rip him off.'" We disagree.

The undisputed proof presented by the State established that the Appellant and the victims, who had never before met, came to the house in order to conduct a drug transaction. Everyone present testified that the Appellant was calm prior to the incident and made no threats whatsoever toward the victims. Lindsey stated that the Appellant patted his side and said he had nothing to worry about when told that the victims were acting strangely. However, after that statement was made, the victims entered the home, and the three proceeded to discuss the drug transaction without incident. Even when the victims gave the Appellant counterfeit money, he still did not appear upset, and no threats were made. Rather, he asked for his marijuana back. It was undisputed that the victims then stood up and proceeded to the door without relinquishing the drugs. The Appellant gave chase down a hallway and into a foyer where he proceeded to shoot each victim twice. According to Lindsey, while the Appellant was firing, he exclaimed, "that's what you get for stealing my fucking weed."

It is undisputed that the shooting events took place in a matter of seconds. Each witness also testified that immediately following the shooting, the Appellant picked up his marijuana and ran out of the house, exiting through a door which was not the closest, and sped away in his vehicle. He also told all the residents of the house to remember that he had not been there and that they had not seen him. Moreover, the Appellant does not dispute that he disposed of the pistol he used in the shooting, as well as the marijuana, prior to being arrested by the police.

Although there is no direct evidence of premeditation in this case, circumstantial evidence of premeditation will support a conviction; however, it must be more than conjecture. In order to convict of first degree murder, the State was required to prove the element of premeditation beyond a reasonable doubt. After careful review of the testimony of the State's witnesses, we are unable to conclude that the element of premeditation has been established.

Upon viewing the evidence in the light most favorable to the State, no evidence was presented that the Appellant made any declaration of intent to kill the victims, made any preparations to conceal the offense prior to the shooting, or had a previously formed design or intent to kill the victims. In fact, there was no showing of hostility at all between the victims and the Appellant, as they had just met and from all indications the transaction was uneventful until the victims tried to flee the house with the Appellant's drugs. Additionally, while the Appellant possessed a weapon, there is no indication that he procured the weapon for the purpose of killing the victims. Simply going armed is not a basis for inferring premeditation to kill a specific victim. *Jackson*, 173 S.W.2d at 410 n.5. The Appellant's comment that he was prepared and had nothing to worry about when informed that the victims were acting strangely does not demonstrate premeditation. Moreover, while all homicides are tragic and produce horrible consequences, we are unable to conclude that these homicides were particularly cruel or heinous in nature. Finally, despite the State's assertion

to the contrary, the evidence does not support a conclusion that the Appellant was calm after the killings. Rather, the evidence indicates that the Appellant panicked and fled the scene of the crime.

The record establishes the Appellant's use of a deadly weapon upon unarmed victims. However, this factor alone will not support a finding of premeditation. *State v. Tune*, 872 S.W.2d 922, 925 (Tenn. Crim. App. 1993). Additionally, the proof demonstrates that the Appellant attempted to conceal his crimes by telling those present at the house that he had not been there that night and that they had not seen him and by disposing of the murder weapon. However, the appellate courts of this state have recognized that:

> [t]he concealment of evidence . . . may be associated with the commission of any crime and the accompanying fear of punishment. One who kills another in a passionate rage may dispose of the weapon when reason returns just as readily as the cool, dispassionate killer. The fact that evidence is subsequently hidden from the police reveals nothing about a criminal's state of mind before the crime.

West, 844 S.W.2d at 148; *see also State v. Long*, 45 S.W.3d 611, 621 (Tenn. Crim. App. 2000). Thus, the State may not rely solely on the Appellant's concealment of evidence to establish premeditation. Additionally, the proof establishes that the Appellant shot each of the victims twice. However, our supreme court has concluded that "repeated blows can be delivered in the heat of passion, with no design of reflection." *State v. Brown*, 836 S.W.2d 530, 542 (Tenn. 1992).

While we acknowledge that premeditation involves a specific intent to kill, which must be formed before the actual killing, Tennessee Code Annotated section 39-13-202(d) requires that at the time the intent to kill is formed, the accused must be "free from excitement and passion." *State v. Clarence Davis*, No. 01C01-9811-CR-00451 (Tenn. Crim. App. at Nashville, Sept. 22, 1999). Here, nothing in the record indicates that the Appellant was sufficiently "free from excitement and passion" at the time the intent to kill was formed. It is undisputed that the Appellant's hostility was triggered by the victims' attempted theft of $1,000 in illicit drugs belonging to the Appellant. The entire event was over in seconds. If the purpose to kill is formed in passion and executed before the passion cools, it is murder in the second degree, not murder in the first degree. *Brown*, 836 S.W.2d at 539-40. Thus, the absence of planning, the absence of prior hostility, and the circumstances surrounding the manner of the killings all mitigate against the presence of premeditation. By all accounts, the proof in the record reveals that the intent to kill was formed in passion following the theft of the Appellant's marijuana. The shooting proceeded to a conclusion without any intervening or dispassionate reflection. Absent the element of premeditation, the Appellant's conviction for first degree murder cannot stand. *See Jackson*, 173 S.W.3d at 410; *State v. Schafer*, 973 S.W.2d 269 (Tenn. 1997); *State v. Malunda L. Myers*, No. 02C01-9511-CR-00336 (Tenn. Crim. App. at Jackson, Nov. 19, 1996).

Nonetheless, under the facts of this case, we conclude that the evidence is sufficient to support a finding that the Appellant knowingly killed the victims, and, thus, committed second degree murder. *See* T.C.A. § 39-13-210(a)(1) (2003). We conclude that the proof more than

establishes that the Appellant acted "knowingly" with an awareness that the shooting of the two victims multiple times would result in their death. Thus, we modify the Appellant's convictions to reflect convictions of second degree murder and remand the case for resentencing.

II. Jury Instruction

Next, the Appellant argues that the trial court erred in granting the State's request for a special jury instruction with regard to premeditation "because it was not a correct statement of the law and it provided undue emphasis" of the issue. The Appellant further contends that the pattern jury instruction on premeditation, which proceeded the special instruction, adequately informed the jury on the issue of premeditation. The pattern charge, in pertinent part, provides:

> A premeditated act is one done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation If the design to kill was formed with premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect. Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.

The court then instructed the jury with a slightly modified version of the State's requested instruction, which stated:

> The elements of premeditation and deliberation[2] are questions for the jury that may be established by proof of the circumstances surrounding the killing. There are several factors that tend to support the existence of these elements which include: declarations by the defendant of an intent to kill, evidence of the procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, infliction of multiple wounds, preparation before the killing for concealment of the crime, destruction or secretion of the evidence of the murder, and calmness immediately after the killing.

On appeal, the Appellant argues that four of the factors listed in the special jury instruction are either incomplete or misstatements of the law. Specifically, he argues that: (1) to establish

[2] In 1995, the legislature deleted the element of deliberation for the crime of premeditated first degree murder. Notwithstanding the deletion, the requirement of deliberation was incorporated within the statutory definition of premeditation with the legislature codifying the language of *State v. Brown*, "requiring some period of reflection, during which the mind is free from the influence of excitement or passion."

premeditation, the accused's declaration of an intent to kill must be directed at the ultimate victim; (2) the procurement of a weapon by itself is insufficient to establish premeditation as it must be procured with an intent to kill the ultimate victim; (3) that the infliction of multiple wounds is insufficient by itself to prove premeditation; and (4) that the destruction or secretion of evidence of the murder is alone insufficient to establish premeditation. According to the Appellant, "[t]aking the special instruction as a whole, it failed to give the jury proper guidance in how to properly consider these kinds of factors in deciding if various pieces of circumstantial evidence might establish premeditation beyond a reasonable doubt."

Under the United States and Tennessee Constitutions, a defendant has a constitutional right to a trial by jury, *see* U.S. CONST. amend VI; Tenn. Const. art. 1, § 6, which includes the "constitutional right to a correct and complete charge of the law." *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990). In determining whether jury instructions are erroneous, this court must review the charge in its entirety and invalidate the charge only if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law. *State v. Vann*, 976 S.W.2d 93, 101 (Tenn. 1998).

a. Incompleteness of Jury Instruction

As noted, the Appellant argues that the special instruction given by the trial court is a misstatement of the law as four of the factors listed in the instruction are not complete statements of the law and are, therefore, misleading to the jury. After review, we agree with the Appellant.

The Appellant is correct in his assertion that when applying the factor regarding procurement of a weapon, it is settled law that the evidence must show that the weapon was procured for use against the victim of the crime. *Jackson*, 173 S.W.2d at 410 n.5; *West*, 844 S.W.2d at 148. As noted, simply procuring or carrying a weapon is not a basis for inferring premeditation to kill a specific victim. Likewise, it has been held that the State may not rely solely upon a defendant's acts of concealment of evidence after the crime to establish premeditation. *West*, 844 S.W.2d at 148; *Long*, 45 S.W.3d at 621. The same has been found to be true with regard to the infliction of multiple wounds, as our supreme court has held that "repeated blows can be delivered in the heat of passion, with no design of reflection." *Brown*, 836 S.W.2d at 542. Finally, our supreme court in *Jackson* impliedly held that the factor regarding the declaration of an intent to kill referred to a declaration of an intent to kill a specific victim, rather than to a general statement. *Jackson*, 173 S.W.3d at 409. Additionally, though not argued by the Appellant, the factor of use of a deadly weapon upon an unarmed victim has also been addressed and found, standing alone, to be insufficient to establish premeditation. *Tune*, 872 S.W.2d at 925.

Thus, while these factors provided to the jury by the special instruction recite those factors enumerated by the Tennessee Supreme Court in *Nichols* and *Jackson* as appropriate factors for consideration as to the presence of premeditation at trial, case law has expounded upon their application and has concluded that certain of these factors are insufficient in and of themselves to warrant a finding of premeditation. Moreover, the form of the special instruction and the specific

language, "There are several factors that tend to support the existence of these elements which includes . . . [,]" comes perilously close to the constitutional prohibition of the trial judge commenting upon the evidence. *See* Tenn. Const. art. VI, § 9. After review, we conclude that instructing the jury with regard to the factors, without also instructing on their expanded application, could have misled the jury as to the applicable law. Thus, the jury instruction, as given, failed to give a complete and accurate instruction of the applicable law.

b. The Deliberation Component of Premeditation

Moreover, we would observe that premeditation is a mental process which, as defined under our criminal code, is comprised of two aspects: (1) an intent to kill another which is (a) formed prior to the act itself and (b) after the exercise of reflection and judgment; and (2) at the time the intent to kill is formed, the accused must be sufficiently free from excitement and passion. To convict of first degree premeditated murder requires proof of both aspects beyond a reasonable doubt, as it is the element of premeditation which distinguishes the crime of first degree murder from that of second degree murder. Our pattern jury charge correctly instructs:

> If the design to kill was formed with premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the decision was carried into effect. Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided. Nevertheless, it remains, that if the design to kill was formed while the accused was in a state of passion or excitement and that the killing is perpetrated before the passion has subsided, the crime is by definition, not first degree murder because premeditation is not established.

T.P.I. Crim. 7.01 (7th ed. 2000).

While the submitted special jury instruction appropriately addresses the aspect of an intent to kill formed prior to the act but after reflection and judgment, it fails to consider "whether the accused was sufficiently free from excitement and passion to be capable of premeditation" at the time the various factors occurred. *See* T.C.A. § 39-13-302(d).

Indeed, as the pattern instruction provides, "if the design to kill was formed while the accused was in a state of passion or excitement and that the killing is perpetuated before the passion has subsided," premeditation is not shown. T.P.I. Crim. 7.01. In this situation, the occurrence of any of the enumerated *Nichols* factors is immaterial to the determination of premeditation if the factors occurred while the accused was in this state of passion or excitement. *See Brown*, 836 S.W.2d at 539 (quoting *Rader v. State*, 73 Tenn. 610, 619-20 (1880)) (if the purpose to kill is formed in passion and executed without time for the passion to cool, it is not murder in the first degree but murder in the second degree). Because the special instruction failed to give a complete charge of the law, its submission to the jury was erroneous. For all of the above reasons, we conclude that the special instruction was error.

III. Consecutive Sentencing

Lastly, the Appellant asserts that the trial court erred in imposing consecutive life sentences following his convictions. The Appellant was sentenced pursuant to Tennessee Code Annotated section 39-13-204 (2003) to life sentences, with the only decision before the court being whether the terms were to be served consecutively.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000) (citing *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997)). The party challenging a sentence bears the burden of establishing that the sentence is erroneous. T.C.A.§ 40-35-401(d), Sentencing Commission Comments.

A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that "[t]he defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood[,]" that "[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high[,] or that "[t]he defendant is sentenced for an offense committed while on probation[.]" T.C.A. § 40-35-115(b)(1), (4), (6) (2003). The length of the sentence, when consecutive in nature, must be "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved" under the circumstances. T.C.A. § 40-35-102(1), –103(2) (2003).

In *Gray*, our supreme court held that before consecutive sentencing could be imposed upon the finding of a defendant to be a dangerous offender, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses. *Gray v. State*, 538 S.W.2d 391, 393-94 (Tenn. 1976). In *State v. Wilkerson* and *State v. Imfeld*, our supreme court reaffirmed those principles, holding that before sentencing a defendant to serve consecutive sentences on the basis that he is a dangerous offender, the trial court must find that the resulting sentence is reasonably related to the severity of the crimes and necessary to protect the public against further criminal conduct. *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002); *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995). Proof that a defendant's behavior indicated no hesitation when the risk to life was high "is proof that the offender is a dangerous offender, but it may not be sufficient to sustain consecutive sentences." *Wilkerson*, 905 S.W.2d at 938.

In imposing consecutive sentencing in this case, the trial court stated on the record:

> The State has asked and the families of these young men have asked that I consider giving you a consecutive sentence. The State asks that I do that because they would suggest that under Tennessee Code Annotated 40-35-115 that you have been a professional criminal as a livelihood. I think that the proof has borne out that although you are a very young man, even as a juvenile, you were doing this perhaps to make a living and maybe because your father couldn't help you and you needed to do. But, nevertheless, that's what you were doing.
>
> You committed this act, albeit you're sorry now - - and I believe you- - when many people were present in that house; children were present. The young woman, the daughter of the man who was the resident of the house, was right there nearby, could have easily been killed. And many human lives could have been lost due to your behavior, more than Kellen Shown and Clayton Hall.
>
> You were under a violation order. You were on probation in Knox County. You were doing okay until then. But you had had six violations of probation as a juvenile, and you had a lot of problems.
>
> These two young men shouldn't have been there, and you sure shouldn't have been where you were, being a drug dealer to provide for the people who were living in that house. One of those young men was shot in the back and in the head. And I think what Mr. Hall said was true. It was a cowardly act, Mr. Compton.
>
> You came there with that gun. You were going to take care of yourself. And they ripped you off so you took care of it. It didn't matter who was there and what happened, and I think that makes you a dangerous offender.

Based upon these findings, it is clear that the trial court found three of the enumerated factors which permit consecutive sentencing: (1) that the Appellant was a professional criminal; (2) that he was a dangerous offender; and (3) that he was on probation when the instant offenses were committed. We note that a finding of any one of the factors for consecutive sentencing enumerated in Tennessee Code Annotated section 40-35-115(b) is sufficient to justify the imposition of consecutive sentences. The Appellant does not dispute the court's findings of any of the three factors. Rather, he argues that the "findings on consecutive sentencing are inadequate under the Criminal Sentence Reform Act of 1989 . . . [.] In this case the trial court has imposed a sentence that amounts to a life sentence without any chance of parole. [The Appellant] will have to serve approximately 104 years before he will be eligible to be considered for parole. . . . [The Appellant] will be in his mid to late sixties before he is eligible for parole if the sentences are served concurrently. Certainly, this is enough to protect the public from any possible danger from [the Appellant]."

Initially, we are constrained to note that this case is being remanded for resentencing based upon our conclusion that the evidence is insufficient to support the convictions for first degree

murder; thus, consideration of this issue is provided for instructional purposes only, as the Appellant's argument is strictly based upon the imposition of two consecutive life sentences. Nonetheless, we conclude that the trial court properly considered the principles of consecutive sentencing as articulated by the Sentencing Act. The record is clear that the Appellant was charged on April 3, 2001, with simple possession and possession of drug paraphernalia. Following his September 10, 2002 conviction for simple possession, he was granted judicial diversion and placed on probation for a period of eleven months and twenty-nine days. The instant offenses were committed on June 14, 2003, well within the probationary period. In fact, the Appellant himself admitted he was on probation at the time, and a violation of probation was entered on June 16, 2003. Clearly, the record supports the court's findings with regard to this factor. Having so found, we find it unnecessary to review the trial court's findings regarding the Appellant's status as being a professional criminal or a dangerous offender. Nonetheless, we would note that the record does appear to support the trial court's findings with regard to those factors as well. This issue is without merit.

CONCLUSION

Based upon our conclusion that the evidence is insufficient to establish the element of premeditation and that the special jury instruction was erroneous, we vacate the Appellant's convictions for first degree murder and remand the case for entry of convictions for second degree murder and resentencing in accordance with this opinion.

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DAVID G. HAYES, JUDGE